Supreme Court of the United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,
Petitioner,

—*v.*—

LOUIS S. NELSON, Warden
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* The symbols (R) and (A) indicate that the documents so designated are to be found in the Record and Appendix, respectively.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 44385

ALFRED WALKER, PETITIONER

vs.

LAWRENCE E. WILSON, Warden, San Quentin State Prison, Tamal, California, et al., RESPONDENT

RETURN TO ORDER TO SHOW CAUSE—
Filed December 20, 1965

Come now the People of the State of California and Lawrence E. Wilson, Warden of the California State Prison at San Quentin, and for a return to the order to show cause issued in the above-entitled matter and returnable on the 20th day of December, 1965, state:

I

That the petitioner, Alfred Walker, is properly confined in the California State Prison, San Quentin, California, pursuant to a judgment of the Superior Court, County of Alameda, No. 35252 in the records of that court, dated December 5, 1963, sentencing him to state prison for the term prescribed by law. A certified copy of that judgment is marked Exhibit A and is attached to and made a part of this return.

II

That petitioner appealed his conviction to the California District Court of Appeal, which court affirmed the judgment. A copy of the unpublished opinion in *People* v. *Walker*, 1/Crim. No. 4543, First District Court of Appeal, Division Two, October 15, 1964, is marked Exhibit B and is attached to and made a part of this return.

III

That petitioner's allegation that his constitutional rights were violated by the search and seizure has no basis in fact or law.

IV

That there is no factual support for petitioner's conclusory allegation that he was denied the right to confront witnesses against him in violation of the Sixth Amendment of the United States Constitution.

WHEREFORE, respondent prays that the Order to Show Cause be discharged, the petition denied, and the proceedings dismissed.

Dated: December 17, 1965.

THOMAS C. LYNCH
Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

/s/ Charles W. Rumph
Deputy Attorney General

POINTS AND AUTHORITIES

I

THERE WAS NO ILLEGAL SEARCH AND SEIZURE

Petitioner is before this Court upon an allegation that the hotel manager unlocked his room and allowed police officers to enter, that the officers entered, arrested petitioner and searched the room without a warrant in vio-

lation of the Fourth and Fourteenth Amendments to the United States Constitution. Petition, p. 4. So far as it goes, this is an accurate summary of some of the facts in this case. However, the most significant facts, and the ones upon which the constitutional issue turns, have been omitted.

The case is a very simple one: an informant who had proven reliable in the past tipped off police that petitioner had five bags of marijuana for sale in Room 3 of the Dunbar Hotel (RT 8-9).[1] Police had had prior dealings with the informant and had obtained convictions from the information she had provided them previously (RT 8). The police gave her funds with which to purchase narcotics and told her to find out exactly where the cache of marijuana was located (RT 10). The officers at that time had no intent to charge a sale and did not, therefore, take the precautions required in a sale case of searching the informant and keeping her under observation and surveillance throughout the transaction (RT 11).

The informant went into the hotel and returned in a matter of a few minutes with a bag of marijuana (RT 10-11). She informed the officers that she had purchased it in the room from a man who was in bed, and that he had extracted the portion she bought from a larger bag secreted under the mattress (RT 14). The officers immediately went to the hotel room and sought entry (RT 14).

They first tried knocking at the door repeatedly and, when that failed to arouse the person they had reason to believe was in the room, they asked the hotel manager to let them in (RT 15). They had every reason to believe that petitioner was in the room since the informant had told them she completed the transaction just a matter of minutes earlier. The informant also had told them that the occupant of the room was in bed and the officers could reasonably assume that there was a possibility he had fallen asleep. This, of course, ultimately was the case (RT 15:25-16:1). ●

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[1] Citations are to the Reporter's Transcript of the record on petitioner's appeal. A copy of that transcript will be lodged with the court.

The reasonableness of the search and seizure was raised at all stages, before, during and after trial. Moreover, it was briefed and argued thoroughly in the California District Court of Appeal.

Our position on appeal was based upon decisions of the California Supreme Court holding that probable cause to arrest can be based solely upon the information of a reliable informant. E.g., *People* v. *Prewitt*, 52 Cal.2d 330, 337 (1959). Upon facts virtually identical to those before this Court, the United States Supreme Court has held likewise in federal prosecutions. *Draper* v. *United States*, 358 U.S. 307, 312-13 (1959). See also *Jones* v. *United States*, 362 U.S. 257, 269 (1960). Since petitioner does not contest the scope of the search, and since in fact it was limited to the premises directly under petitioner's control, we submit that there was no violation of the Fourth Amendment to the United States Constitution, either under state or federal standards.

II

THERE WAS NO VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No facts are stated in support of the conclusory allegation that petitioner was denied the right of confrontation by the failure of either the prosecution or defense to produce the informant to testify at trial. There is no allegation that the prosecution deliberately prevented the informer from being a witness, and even if there were such an allegation, there is absolutely no support in the record for such a proposition.

Moreover, petitioner does not allege that he or his attorney actively sought to call the informer as a witness, even though the police disclosed at all times the name of the informant and all information in their possession as to her whereabouts.

In any event, this issue is not properly before the Court in that there are no allegations of supportive facts to

substantiate the claim of denial of a constitutional right. The controlling law in such a case is best summarized by the following statement of a federal district judge:

> "Merely culling language from federal and state authorities, as petitioner has done, will not satisfy the requirement that serious charges have some basis in fact. Petitioner is not entitled to a hearing on his belated accusations, unsupported by factual detail that he was 'forced' to plead guilty and that his lawyers practiced 'fraud' upon the court." *United States ex rel. Best* v. *Fay*, 239 F.Supp. 632, 634 (S.D. New York 1965). *Cf. United States ex rel. Homchak* v. *New York*, 323 F.2d 449, 450-51 (2d Cir. 1963).

CONCLUSION

For the reasons stated above, we submit that the Order to Show Cause should be discharged, the petition denied and the proceedings dismissed.

Dated: December 17, 1965.

THOMAS C. LYNCH
Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

/s/ Charles W. Rumph
Deputy Attorney General
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 44385

ALFRED WALKER, PETITIONER

-vs.-

LAWRENCE E. WILSON, Warden, San Quentin State Prison, Tamal, California, et al., RESPONDENTS

PETITIONER WALKER'S MOTIONS FOR (1) AN EVIDENTIARY HEARING; AND (2) A PRETRIAL CONFERENCE AND POINTS AND AUTHORITIES IN SUPPORT THEREOF—
Filed August 5, 1966

MOTIONS BEFORE THE COURT

Petitioner hereby moves the Court for an order requiring an evidentiary hearing pursuant to 28 U.S.C. § 2243 and the authority established in *Townsend* v. *Sain*, 372 U.S. 293 (1963).

As a second motion, petitioner hereby moves the Court for an order requiring a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The present motions and supporting memoranda are directed only to the necessity of an evidentiary hearing in order to resolve issues of fact concerning the unconstitutionality of petitioner's arrest and the search of his premises. Issues of law are not discussed in these papers except as they refer to and define relevant areas of factual inquiry.

THE FACTS *

On the morning of August 9, 1963, the petitioner, Alfred Walker, was given an automobile ride from San Francisco to Oakland, California, by the informer in this case, Miss Frances Jenkins. The petitioner had been in San Francisco attempting to obtain employment and, finding nothing certain, decided to seek employment from a friend in Oakland. (TT 84, 85)

After arriving in Oakland, petitioner desired to rent a hotel room in order to groom himself and get some sleep. Petitioner had not had proper sleep the night before and had taken a sleep-inducing tranquilizer known as Percodan. Upon the recommendation and with the assistance of Miss Jenkins, the petitioner obtained room number 3 at the Dunbar Hotel, 14th and West Streets, in Oakland. (TT 86-90)

Soon after entering his room with Miss Jenkins, petitioner decided to take a bath. Leaving Miss Jenkins alone in room 3, petitioner entered the hallway outside his room and proceeded to the bathroom nearby where he drew his bath water. He returned to his room several minutes later, whereupon Miss Jenkins left the room for the purpose of obtaining a bath towel for petitioner. Miss Jenkins did not, however, return within the next few minutes, so petitioner undressed himself, entered the bathroom, washed his underclothing, and bathed himself. He returned to his room immediately after his bath, dried himself with a hand towel, and placed his washed clothing on the radiators to dry. He immediately went to bed and to sleep. (TT 80-82)

At about this same time, Miss Jenkins went to a telephone to call the Oakland Police Department to report to one Sgt. T. Hilliard, that the petitioner allegedly possessed marijuana. Sgt. Hilliard, accompanied by another officer, Mr. Clyde Walker, then drove to the corner of 11th

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* The facts have been taken from testimony on record with the the Court. "PX" refers to pages from the transcript of the preliminary examinations; "TT" refers to pages from the transcript of the trial.

and West Streets, three blocks from the Dunbar Hotel, and met Miss Jenkins there. (PX 19, TT 9) At this point, Sgt. Hilliard got out of his undercover car and entered Miss Jenkins' car in order to discuss the information she claimed to have. (TT 9) Important parts of this discussion are presently in dispute and thus form part of the grounds for the present motions before the Court. Certain events occurred, however, which are not disputed.

While sitting in Miss Jenkins' automobile, Sgt. Hilliard allegedly gave her a $20 bill and instructed her to purchase some marijuana from the occupant of room 3. (TT 10) Upon cross-examination, Sgt. Hilliard testified that the serial number of this bill was recorded, but was unable to say when it was recorded, or where it was recorded, or who recorded it. (PX 23) Nor were the records of this supposedly marked bill ever found despite a request by counsel and an order of the court. (PX 24) At no time during this meeting with Miss Jenkins did Sgt. Hilliard search her or have her searched by a matron or any other police official. Nor did Sgt. Hilliard or any other officer search Miss Jenkins car, her purse, or any of her effects to determine whether or not the informer possessed any marijuana or narcotics paraphernalia. (PX 22, 23) Sgt. Hilliard furthermore admitted that at the time he failed to take these procedures he had full knowledge of a long criminal record of the informer, including the use of narcotics. (TT 69) Sgt. Hilliard further admitted that for a number of years, including the "recent past," marijuana plants could be found growing in vacant lots in Oakland. (TT 73, 74)

Following their brief meeting, Sgt. Hilliard got out of the informer's car and entered his undercover car with Officer Walker. The informer, whose activities were unobserved within her car, then drove to the Dunbar Hotel. Sgt. Hilliard and Officer Walker followed the informer in their car to a point one block away from the hotel, at which point they parked. (TT 11) Miss Jenkins parked her car by the hotel, got out, and entered the building. Approximately 5 minutes later she emerged from the

hotel, entered her car, and drove unaccompanied to the corner of 11th and West Streets, 3 blocks from the hotel. (PX 14, 25, TT 12) Sgt. Hilliard also returned to this corner and again entered the informer's car. There Miss Jenkins gave the Sergeant a small bag of a vegetable substance which he identified as marijuana. (PX 14, TT 12) Miss Jenkins told Sgt. Hilliard that she had gone to room 3, petitioner's room, and purchased the bag with the supposedly marked $20 bill. She gave a description of the petitioner and added that other marijuana was under his mattress. (PX 26, TT 14) According to Sgt. Hilliard, she also said that the petitioner intended to leave the hotel as quickly as he could, although the informer denies that she made any such statement. (PX 21, TT 15; declaration of Frances Jenkins, attached hereto.)

Sgt. Hilliard then dismissed the informer without questioning her story. He did not at this time follow orthodox procedures of searching the informer or having her searched in order to see whether or not she had on her person, in her purse, or in her car the $20 bill which she supposedly used to purchase the marijuana, or whether she had marijuana or other narcotics paraphernalia. (PX 22) Nor did Sgt. Hilliard question circumstances of the informer's story, such as where she had met the suspect, (PX 26) where the suspect had obtained the marijuana, how he had obtained the marijuana, or how the informer had obtained her knowledge of it. (PX 27) Miss Jenkins left the corner and no longer participated in subsequent events.

On the information which he had been given, important aspects of which are presently disputed, Sgt. Hilliard immediately decided to enter the Dunbar Hotel in order to make an arrest of the suspect, the petitioner in this action. (TT 14) He did not seek to take action independent of the informer to corroborate or investigate the information which he had been given. He did not seek to obtain a search or arrest warrant, although it was 1:00 P.M. and the Courthouse was only a few blocks away. (TT 14) Sgt. Hilliard did, however, place Officer Walker in a position of surveillance where, because of the con-

figuration of the hotel, he was able to view the petitioner's room and all exits from the hotel. (PX 26)

Approximately 10 minutes after the informer had left the hotel where she allegedly made her purchase of marijuana, Sgt. Hilliard entered the hotel, proceeded to room 3, and knocked on the door with his clenched fist no fewer than approximately fifty times. (PX 36, TT 26) Despite his repeated knocking, Sgt. Hilliard failed to arouse the sleeping petitioner. He then prompted the manager of the hotel to open the door to petitioner's room.

Upon entering the room, Sgt. Hilliard discovered that the shades were drawn, the light was off, and petitioner was asleep in bed. At this point the Sergeant was again joined by Officer Walker. Using his flashlight, Sgt. Hilliard proceeded to the petitioner's bed and was able to awaken him only by physically shaking him three times. (PX 16; TT 15) At no time did the petitioner give Sgt. Hilliard consent to enter the room. (TT 26)

After waking the petitioner, Sgt. Hilliard saw needle scars on the petitioner's arm. The Sergeant arrested the petitioner for the use of Percodan and asked the petitioner if he had any narcotics equipment in the room. Petitioner answered that he did not but that the Sergeant had permission to look anyway. (TT 17) The Sergeant immediately lifted the mattress of petitioner's bed and discovered several bags of marijuana. He then searched the petitioner (who was nude), his clothing, his wallet, and the entire room. (PX 44) Despite this search, Sgt. Hilliard was unable to find the $20 bill which the informer had allegedly used in order to purchase a bag of marijuana only minutes before. (TT 25)

Petitioner was subsequently tried for possession of narcotics for sale and, over his objection to the admission of evidence obtained through an illegal search, was convicted of the count. He is presently serving his term of 5 to 15 years in San Quentin Prison.

THE RECORD AND NEW EVIDENCE INDICATE THAT PETITIONER WAS UNCONSTITUTIONALLY ARRESTED AND HIS PREMISES UNCONSTITUTIONALLY SEARCHED.

That there is a constitutional preference for arrests and searches only upon the issuance of warrants is clear. *Wong Sun* v. *U.S.*, 371 U.S. 471, 479, 480 (1963); *Johnson* v. *U.S.*, 333 U.S. 10, 14 (1948); *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). It is equally well settled that arrests and searches made without warrants can be constitutional only if made upon probable cause, and that probable cause in such cases can exist only in two narrowly defined instances:

(1) When a *reliable informer* gives the arresting officer information which would "warrant a man of *reasonable caution*" to believe that a felony has been committed; *Carroll* v. *U.S.*, 267 U.S. 132, 162 (1924); *Beck* v. *Ohio*, *supra*, at 92; and

(2) When an *unreliable* informer gives the acting officer information which would reasonably appear to create a "*pressing emergency*" requiring an arrest or search without a warrant. *People* v. *Cedeno*, 218 Cal. App.2d, 213, 230 (1963).

It is petitioner's firm opinion that neither of these standards were met in the present case.

A. *The arresting officer failed to take reasonable precautions necessary to establish probable cause for petitioner's arrest.*

The arresting officer received the *only* information on which he arrested petitioner from an informer whose reliability, as will be discussed below, was at best seriously in doubt. However, even assuming for the moment that the informer had a past record of sufficient reliability, the information obtained in the instant case was inherently unreliable since it was obtained through information-gathering activities which were not supervised or independently corroborated in any manner even though

it was clear that a serious risk of misinformation existed.

The facts speak for themselves. Acting on the information initially obtained from the informer by telephone —information in itself not sufficient to create probable cause—the police failed to corroborate or investigate this information with normal or reasonable precautions. Despite the fact that the informer was a known narcotics user and marijuana was readily available to her, she was not searched before she entered the hotel to make her alleged purchase. Nor was she searched either for narcotics or for the $20 bill which she supposedly used to make her purchase. When the police entered petitioner's room and arrested him, however, they discovered him to be in a state of sound sleep and, despite a thorough search of the petitioner, his clothing, his wallet, and the entire room, failed to discover the $20 bill which the petitioner allegedly had accepted only ten minutes before.

The totality of these facts conclusively indicates not only that the informer failed to make the alleged purchase of marijuana on which the police based their arrest, but that if the police had followed reasonable and normal precautions with the informer, they would have discovered significant irregularities in the informer's story, including the $20 bill with which the informer claimed she had made her purchase. Such a discovery, of course, would have clearly discredited the reliability of the informer's information. Indeed, there is no doubt that the discovery of such an irregularity in the informer's story, or of any other irregularity which may have existed (such as the possession by the informer of marijuana), would have precluded the arresting officer from obtaining a warrant or from reasonably finding that there was probable cause for petitioner's arrest.

At the very least, the irregularities which petitioner contends should have been discovered upon normal search and questioning of the informer would have prompted the police to investigate or corroborate the informer's story independently before making an arrest. Yet the police failed to corroborate the informer's story with a single salient inquiry testing the informer's story either from her own mouth or from an independent source. The of-

fect of the police's failure to search the informer, question her about the circumstances by which she knew the petitioner, or independently corroborate essential aspects of the petitioner's story, was merely to accept the informer's word without reason. The activities of the police added nothing to her story nor confirmed it in any way. They merely added insufficient information to what was originally insufficient information. "The quantification of the information does not necessarily improve its quality; the information does not rise above its doubtful source because there is more of it." *Ovall* v. *Superior Court*, 202 Cal.App.2d. 763, 21 Cal.Rptr. 387 (1962), Tobiner, J. In fact, Sgt. Hilliard's failure to employ reasonable precautions with the informer was *less* than the mere quantification of insufficient information since had he employed proper procedures he would have discovered the unreliability of the information before him. It is precisely for this reason that the constitution demands that reasonable precautions and investigations be made before the police may invade the privacy of a citizen or his home.

It is petitioner's contention that the police procedures were so basically defective that the writ of habeas corpus should be granted on the record as it stands. At the very least, however, a hearing should be held in order to consolidate the record by learning why proper procedures were not followed, and what the police would have learned and reasonably concluded had constitutional safeguards been employed.

B. *The informer's reliability was not established at the time of petitioner's arrest.*

It is petitioner's position that no matter how reliable the informer's past record was at the time of petitioner's arrest, the information in this case was inherently unacceptable as grounds for probable cause. But it is also clear that if the informer was *not* proven to be reliable at the time of the arrest, there could be no possibility that there was probable cause based, as it was, solely on information obtained from her. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Beck* v. *Ohio*, supra; *People* v. *Cedeno*,

supra. Recently obtained information, not heretofore presented to the Court, indicates that the reliability of the informer was indeed not established at the time of petitioner's arrest.

It should be noted at this point that the informer in this case was not available for examination at petitioner's preliminary hearing or trial. Nor was she available at any time for questioning by counsel for petitioner or by any court having jurisdiction over this case. Petitioner's trial attorney attempted to find and subpoena the informer before trial but was unable to do so and was successfully resisted in his efforts by the State Attorney. (PX 28-34) As a consequence, the issue of the informer's reliability was determined solely on the testimony of the arresting officer, Sgt. Hilliard. On June 8, 1966, however, counsel for petitioner interveiwed the informer for the first time concerning her participation in the present case. (See Affidavit of J. Stanley Pottinger attached hereto) It is petitioner's belief that the absence of the informer from earlier proceedings in this case has led to material error which can be resolved only upon hearing.

On the issue of reliability, Sgt. Hilliard testified at the preliminary hearing that during a period of two years prior to the petitioner's arrest the informer had reliably given information which led to "at least" twenty arrests and convictions. (PX 20) Based on this particular testimony, the court expressly found that the informer was reliable and was not needed to appear in court on this issue.

> "THE COURT: Well, let me take up your first motion as to the subpoenaing of the witness. My view is that the informant's role in this proceeding today was also to establish reasonable cause for the witness' entry and subsequent arrest and search—
>
> "MR. HOOLEY: (Defendant's counsel) Well, it also supplied the—
>
> "THE COURT: —after having given the identity (of the informant) and *furnished the fact that he (Sergeant Hilliard) had twenty convictions based upon past disclosures, which would make her reliable,*

and the identity was disclosed. So that part is over." (PX 47) (Emphasis supplied)

At petitioner's trial, however, on the question of reliability Sgt. Hilliard testified only to *two*—not twenty—occasions on which the informer had given the police reliable information which led to arrests. (TT 21, 22) In one of these two instances, the case of one Kilbourne York, the information obtained by the police led only to an arrest and no conviction. (Mr. York was arrested for illegal possession of narcotics but was released when it became known that he had a valid prescription for its use.) (TT 22) Thus, in the first of only two instances relied on to establish the informer's reliability, it appeared that the information given by Miss Jenkins, contrary to being reliable, turned out to be unreliable.

The one remaining instance relied upon by the police to establish the informer's reliability was a case of one Robert Gibson. (TT 21) Miss Jenkins, however, declares under penalty of perjury that she did not furnish the police with information in this case. (See Declaration of Frances Jenkins, Paragraph 5, and the Affidavit of J. Stanley Pottinger, Paragraph 7, attached hereto.) It should also be noted that under the same penalty the informer was of the opinion that the only occasion on which she furnished the police with information prior to petitioner's arrest was in the case of Kilbourne York, discussed above.

It is clear that the issue of the informer's reliability, without which there could have been no probable cause for petitioner's arrest, is very much in question if, indeed, it is not resolved on the record against the State.

C. *No "Pressing Emergency" Existed Requiring An Arrest on the Basis of Unreliable Information.*

Assuming that the informer had not been proven reliable at the time of petitioner's arrest, the question arises as to whether or not there existed a "pressing emergency" which necessitated an immediate arrest and search without the safeguards of a warrant.

At the preliminary hearing and at trial, Sgt. Hilliard testified that there were two reasons in his opinion which necessitated an immediate arrest: (1) that the informer allegedly stated that petitioner wanted to sell the narcotics as fast as possible and return to San Francisco (PX 21, TT 15); and (2) that the Sergeant could not have readily obtained a warrant because it was during the lunch hour and "the judges in the municipal court were out to lunch." (TT 14, 15)

There is substantial evidence to be brought before the Court which indicates conclusively that neither reason testified to by Sgt. Hilliard could create probable cause for his warrantless entry into petitioner's room. Frances Jenkins, the informer, has declared under penalty of perjury that she did *not* inform the police that petitioner allegedly intended to leave his room quickly, or return to San Francisco, as she admittedly had no information concerning these matters. (See Declaration of Frances Jenkins, Paragraph 2, and Affidavit of J. Stanley Pottinger, Paragraph 4, attached hereto.) This evidence, in addition to other evidence in the record, places the question of emergency in direct dispute.

The second alleged reason given by Sgt. Hilliard—that all the judges were unavailable during lunch hour—may be disposed of summarily. Counsel for petitioner has learned from the Honorable William H. Brailsford, Judge of the Superior Court, Alameda County, that there are approximately twenty judges capable of issuing warrants from the Oakland Court House, and that considering normal absences, approximately twelve to fourteen judges are normally available throughout an average court day. The Judge further stated that not all of these judges are absent at any one time during the day, and that even those judges who are not in the Court House itself, but who are in the vicinity at a luncheon or elsewhere, are nonetheless prepared to review requests for warrants and take appropriate action. It was Judge Brailsford's opinion that failure to seek a warrant on the grounds that all judges were on their lunch hour could not be considered a good excuse. (See Affidavit of J. Stanley Pottinger, Paragraphs 10, 11, attached hereto.)

Counsel for petitioner also learned from the Honorable Winton McKibben, Judge of the Municipal Court, Oakland-Piedmont, that there are approximately four or five judges available to issue warrants throughout the normal court day and that one or two of the judges as a matter of course is on duty by 1:30 P. M., with the occasional exception that on Fridays (the day petitioner was arrested) the judges may extend their lunch hour to a time between 1:30 and 2:00 P. M. (See Affidavit of J. Stanley Pottinger, Paragraph 12, attached hereto.) Petitioner was arrested at approximately 1:00 P. M. The police would have lost no time, or at most, in Judge Brailsford's opinion, "negligible" time in seeking a warrant. Certainly the fundamental constitutional guarantees of which this petitioner has been deprived cannot depend upon such cavalier and inconsequential considerations as the remote possibility that a few minutes might be lost during a lunch hour. If such were the case, the constitutional requirement that warrants normally be sought could be dispensed with upon the slightest, most whimsical of excuses. The Constitution, we believe, demands more.

D. *The Trial Court Failed to Make Proper Findings on the Issue of Probable Cause.*

Following the presentation of evidence relating to the issue of probable cause for petitioner's arrest and the search of his room (TT 5-27), the trial court ruled for the State on this crucial issue with the single phrase as follows: "I think the officer acted reasonably and the search was legal." (TT 27) Such a finding, or rather lack of finding, is clearly inadequate. *Townsend* v. *Sain*, supra, at 313, 314; *Beck* v. *Ohio*, supra, at 92.*

It is possible that the trial court made an implied finding on the issue of probable cause. After all evidence had

* The present case is directly analogous to the *Beck* case, where the Supreme Court stated:

> "The trial court made no findings of fact in this case. The trial judge simply made a conclusionary statement: 'A lawful arrest has been made, and this was a search incidental to that lawful arrest.'" (p. 92)

been presented on this issue, and immediately prior to the trial court's inadequate summary statement above, the court questioned the witness, Sergeant Hilliard, as follows:

(Examination of Sgt. Hilliard by Mr. Hooley, counsel for defendant)

"Q. August 9th? At no time was any consent given to you by Mr. Walker to enter that room?

"A. No, sir.

"Q. Your entry was based upon the information from Frances Jenkins with the assistance of the manager of the hotel, is that correct?

"A. Yes.

"Q. And solely upon the information from her and that assistance?

"A. Yes, that is true.

"MR. HOOLEY: Thank you. That is all.

"THE COURT: However, after you got in the room, did you tell him (the petitioner) you wanted to search the premises?

"THE WITNESS: Yes, I did, Your Honor. I asked him if I could search the premises looking for Percodan or any narcotic paraphernalia.

"THE COURT: And he said it was all right?

"THE WITNESS: He did, yes.

"THE COURT: Do you have any further questions, Mr. Mead? (State Attorney)

"MR. MEAD: No, Your Honor.

"THE COURT: All right. You can step down, Sergeant.

Is there any further evidence on the search and seizure point?

"MR. MEAD: No, we will submit upon this evidence.

"MR. HOOLEY: May I reserve, then, Your Honor, just the objection at the proper time in this case when Mr. Mead offers this into evidence, an objection based upon the testimony we have heard?

"THE COURT: Yes, you may, but my view is, Mr. Hooley, and I will inform you of it now, is that

I think the officer acted reasonably and the search was legal.

"MR. HOOLEY: Right. I—just to protect the record, if I may, Your Honor. I will object."

If an implied finding was made in this exchange, it could only be that the court believed that the petitioner's consent to a search for Percodan or narcotics paraphernalia was somehow a consent to the prior entry of his room, his arrest, and a search for marijuana. Such an implied finding, if indeed it was made at all, was neither supported by prior testimony in the record, nor could such a finding possibly be grounds for probable cause under appropriate legal standards. The police entered petitioner's room with the assistance of the hotel manager and nothing more. In fact, the petitioner was asleep at the time the police entered his room and was awakened only after the illegal entry took place. The Fourth Amendment's guarantee that persons shall be "secure in their persons [and] houses" begins at the doorway. Only with the consent of the citizen involved, a search warrant, or probable cause may an arresting officer enter the privacy of one's quarters. Consent to enter was admittedly not received (TT 26); a warrant was neither sought nor issued (TT 14); and probable cause, petitioner submits, did not exist. Entrance into petitioner's room, therefore, was unconstitutional at the point of entry, and subsequent activity by the police was consequently illegal. *Stoner* v. *California*, 376 U.S. 483, 488-490 (1964); *People* v. *Burke*, 208 Cal.App.2d 149, 160 (1962).

Furthermore, even if petitioner were capable *in law* of vitiating an illegal entry by giving a subsequent consent to the entry, *in fact* it is clear that no such consent was given in this case. According to the record, after the police entered the room they awakened petitioner from a sound sleep, *only then* saw scars on his arm indicating a recent use of Percodan, and *only then* arrested him for such use. There was clearly no probable cause for petitioner's arrest for use of Percodan *prior* to the illegal entry into the room, nor did the police base their entry into petitioner's room on any information regarding the

use of Percodan. (TT 25) The petitioner, having just been awakened, was questioned about his use of Percodan and, admitting such use, consented *only* to a search for that drug. Considering petitioner's drowsy condition, it is doubtful that he made an intelligent waiver of his constitutional rights even with regard to a limited search. Regardless of the validity of that limited consent, however, there can be no doubt that it was not in any way a consent to the entry of his room or to a search for marijuana of which the petitioner was unaware and of which the police in no way apprised him. *Stoner* v. *California*, 346 U.S. 483 (1964); *Channel* v. *U.S.*, 285 F.2d 217 (9th Cir., 1960); *Cipres* v. *U.S.*, 343 F.2d 95 (9th Cir., 1965).

It is evident that the trial court made no express finding on the question of probable cause. If the court made an implied finding, it is neither supported by the record nor by constitutional principles. In either case, the trial court committed material error which can be amended only upon a hearing.

CONSTITUTIONAL AUTHORITY REQUIRES A HEARING TO RESOLVE THE ISSUES PRESENTED.

In *Townsend* v. *Sain*, 372 U.S. 293, 314 (1962), the Supreme Court established standards by which an evidentiary hearing is mandatory.

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a susbtantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

It is petitioner's opinion that the issues raised in the present case fall squarely within the standards set forth above.

1. *The Merits of the Factual Dispute Were Not Resolved in the State Hearing.*

As discussed under subletter D above, the trial court either failed to make a finding of fact or impliedly made findings of fact which were not supported by the record or which were judged by inapplicable constitutional standards.

> "Reconstruction (of the trial court's findings) is not possible if it is unclear whether the State finder applied the correct constitutional standards in disposing of the claim. Under such circumstances, the district court cannot ascertain whether the State court found the law or the facts adversely to the petitioner's contention. Since the decision of the State trier of fact may rest upon the error of law rather than the adverse determination of the facts, a hearing is compelled to ascertain the facts."

Such is precisely the case here, where it is necessary to decide upon a hearing whether the court made any findings of fact, and if so, what they were; or, whether the court incorrectly assumed that a consent to a limited search after the police entered the room vitiated the illegal entry itself.

2. *The State Factual Determination is Not Fairly Supported by the Record as a Whole.*

Even if one assumes that a post-entry consent may, in certain cases, legitimize an otherwise illegal entry, such a finding in the present case (if such can be implied) is not supported by the record as a whole. As discussed under subletter D above, it is clear that the petitioner consented only to a limited search under circumstances of fear and drowsiness which clearly indicate that he could not have intelligently waived his right to the production of a warrant.

3. *The Fact Finding Procedure Employed By The State Court Was Not Adequate to Afford a Full and Fair Hearing.*

In light of the fact that the informer in this case, the sole source of information upon which probable cause was allegedly based, was never questioned concerning her participation in this case is, in petitioner's view, material error. In light of the material facts presently in dispute which arise from the informer's role in this case, her absence from all prior proceedings is "grave enough to deprive the State evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend." *Townsend* v. *Sain*, supra, at 316.

4. *There is a Substantial Allegation of Newly Discovered Evidence.*

As discussed under subletters A through D above, the informer's previously unquestioned and unknown version of her participation in this case raises material issues of fact which go to the very heart of her reliability and the probable cause for petitioner's arrest. (See Declaration of Frances Jenkins and Affidavit of J. Stanley Pottinger, attached hereto.

5. *The Material Facts Were Not Adequately Developed at the State Hearing.*

As discussed under subletter A above, it is apparent that the court at petitioner's preliminary hearing made a finding of probable cause based expressly on testimony that the informer had given reliable information leading to at least twenty arrests and convictions prior to petitioner's case. In light of the police testimony at trial and the informer's present version of the facts, both of which dispute the testimony of twenty arrests and convictions, it is evident that the court made its findings on facts not adequately developed at the hearing.

6. *Other Facts Indicate That the Trier of Fact Did Not Afford the Habeas Applicant a Full and Fair Fact Hearing.*

It should be evident both from the facts on record and from facts newly discovered, as discussed under subletters A through D above, that the procedures by which the police allegedly found probable cause for the petitioner's arrest were so defective and inadequate as to be constitutionally unsound. It is petitioner's further contention that had the informer been present at the hearing, and had the facts both as they are known on the record and as they are now alleged been presented to the court, the court could only have found that probable cause did not exist. Only upon a hearing can the questions presented in these papers be resolved and the facts relevant to these questions be found.

Petitioner therefore respectfully requests that the Court grant its motion for a hearing either according to the mandatory requirements of *Townsend* v. *Sain* or in the sound discretion of the Court.

A PRETRIAL CONFERENCE IS NECESSARY IN ORDER TO EXPEDITE A HEARING.

Should the Court grant petitioner's motion for a hearing, it is petitioner's opinion that a pretrial conference would greatly assist in simplifying and limiting the issues involved. There are potentially a great number of issues and related sub-issues which might be investigated in a hearing. Similarly, the number of witnesses who might be called at a hearing will vary depending upon the issues to be resolved. Petitioner believes that many of these issues may be clarified and the witnesses decided upon through discussions and stipulations between counsel. A pretrial conference will also assist the Court and counsel in determining the time necessary for an adequate hearing and will prevent the possibility of undue surprise.

Petitioner, therefore, respectfully requests that the Court grant its motion for a pretrial conference.

Dated: August 5, 1966.

Respectfully submitted,

BROAD, BUSTERUD & KHOURIE

/s/ J. Stanley Pottinger
Attorneys for Petitioner

Receipt of the within Notice of Motions, Motions and Points and Authorities in Support Thereof is hereby acknowledged.

Dated: August ....., 1966.

THOMAS C. LYNCH
Attorney General
of the State of California
6000 State Building
San Francisco, California 94102

By .....

DECLARATION

I, FRANCES JENKINS, declare the following:

1. On the morning of August 9, 1963, I gave a man, whose name was unknown to me, a ride in my car from San Francisco to Oakland, California. During that day this man obtained a room at the Dunbar Hotel, 14th and West Streets, in Oakland. While in the hotel room, I talked to this man about the possibility of "turning a trick" with him. It was not my intention to have any relations with this man at that time or later, however, and without having any such relations I left this man's room. Upon leaving I told him that I would "pick him up later," that is, return to the hotel at a later time for relations.

2. I then left the hotel and informed one Sargent Hilliard of the Oakland Police Department that the man in the hotel room was in the possession of marijuana. I did not tell the police this man's name as I did not know it. I also did not tell the police this man's home address, nor his occupation, nor whether the man had a criminal record, nor where he intended to go from the hotel, nor when he intended to leave the hotel, as I had no knowledge of these matters. I did give the police a description of the man, telling them that the man was Negro, short to medium in height, and had a mustache.

3. Sargent Hilliard met me shortly afterward near the Dunbar Hotel. He gave me a $20 bill and told me to make a purchase of a bag of marijuana from the man I had described in the hotel room. Sargent Hilliard and I were sitting in a car at this time and neither he nor anyone else searched me, the car or any of my possessions.

4. I went into the hotel and remained there for approximately five minutes after which I came out of the hotel with a bag of marijuana. Upon leaving the hotel, I immediately met Sargent Hilliard at a nearby corner and gave him the bag of marijuana. I informed him that I had purchased it from the man in the hotel room whom I had described. Neither Sargent Hilliard nor anyone else searched me at this time. I then left the corner and

Sargent Hilliard and have never seen the man I described in the hotel room again.

5. I do not consider myself a paid professional informer. The police have not pressured me to give them information regularly. To the best of my recollection, I have given them information on criminal suspects only once before the occasion referred to above, and that was in the case of one Kilbourne York. In the cases of Robert Gibson and R. D. Davis, I did not inform the police.

6. On June 8, 1966, in the presence of Mr. W. Hartley, Correctional Counselor, I related the above events to Mr. J. Stanley Pottinger, who represented himself to be an attorney for one Mr. Alfred Walker.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Frances Jenkins
FRANCES JENKINS
7-28-66

Place: Santa Rita

Date: 7-28-66

STATE OF CALIFORNIA)
) ss:
CITY AND COUNTY OF SAN FRANCISCO)

AFFIDAVIT

I, J. STANLEY POTTINGER, being duly sworn, say as follows:

1. I am the attorney for the petitioner in the above action.

2. On June 3, 1966, I obtained permission from Iverne R. Carter, Superintendent of the California Institution for Women, Corona, California, through Mr. Robert Nel-

son, Correctional Counselor No. 3, and from Miss Frances Jenkins, the informer in this case, to interview the latter concerning her participation in petitioner's arrest. On June 8, 1966, in the presence of Mr. W. Hartley, Correctional Counselor No. 1, I interviewed Miss Jenkins in Corona, California.

3. Miss Jenkins stated to me that no other person had previously interviewed her or talked with her about petitioner's case or her participation in it. During the course of our interview, Miss Jenkins stated that she had given the petitioner a ride to Oakland from San Francisco on the morning of August 9, 1963, and had gone with him to the Dunbar Hotel to help him secure a room. She stated that when they entered the room, she had discussed briefly the possibility of "turning a trick" with the petitioner but that as far as Miss Jenkins knew, the petitioner had little or no money and she had no definite intention of having relations with him. Soon after entering the petitioner's hotel room, Miss Jenkins left it and told the petitioner that she would "pick him up later", that is, return to the hotel later for relations. The petitioner at this time was wearing shoes, socks, pants and a T-shirt or similar shirt.

Upon leaving the hotel, the informer called one Sgt. Hilliard of the Oakland Police Department and told him that petitioner was in a room at the Dunbar Hotel and was in the possession of marijuana. Neither at this time nor at any later time did Miss Jenkins tell the police the petitioner's name, his address, his occupation, whether or not he had a criminal record, where he intended to go from the hotel, or when he intended to leave the hotel, as she had no knowledge of these matters. She gave the police a description of the petitioner, telling them that he was Negro, short to medium in height, and had a moustache.

5. Miss Jenkins then met Sgt. Hilliard shortly after her phone call at a corner near the Dunbar Hotel. Miss Jenkins said that Sgt. Hilliard gave her a $20 bill and instructed her to purchase a bag of marijuana from the man she had described in the hotel room. At no time did Miss Jenkins see Sgt. Hilliard mark or record the bill.

Miss Jenkins and Sgt. Hilliard were at this time sitting in a car. At no time did Sgt. Hilliard search Miss Jenkins or her car.

6. Miss Jenkins went immediately into the hotel and remained there for approximately five minutes. She then emerged from the hotel and met Sgt. Hilliard at a nearby corner. She next gave him a bag of marijuana which she said she had purchased from the man she had described in the hotel room, the petitioner. Neither Sgt. Hilliard nor anyone else searched the informer at this time. Miss Jenkins then left the corner and was not concerned with the petitioner or her participation in his arrest at any time thereafter.

7. I questioned Miss Jenkins about her status as an informer prior to petitioner's arrest. She said that the police had not pressured her for information and that she did not believe she had given the police information on criminal suspects prior to petitioner's case except in the case of one Kilbourne York. She also stated that in the case of a Robert Gibson and R. D. or Curly Davis, she did not give information to the police. She stated that she was not sure who did give information to the police in the Gibson case but that it might have been an acquaintance of hers known as Frank Hightower. She was unable to say for sure as she could not recall or did not know the circumstances of the Gibson case or who was involved in it.

8. I informed Miss Jenkins that she might be needed to testify to the events she related to me at a hearing for the petitioner. She stated, and Mr. Hartley confirmed, that she would probably be paroled in the month of July, 1966, and would return to her home in Oakland, California. She said that she would be available for testimony at any time after parole and could be found through her parole agent, Miss Carolyn Turner, of the San Francisco District Office, Parole and Community Services Division.

9. On July 28, 1966, I learned that Miss Jenkins was being held at the Rehabilitation Center at Santa Rita, California. I interviewed Miss Jenkins there and obtained

from her the attached Declaration under Penalty of Perjury confirming the events of which she spoke in our earlier interview, as stated above.

10. On August 1, 1966, I talked by telephone with the Honorable William H. Brailsford, Judge of the Superior Court, County of Alameda, California. I informed Judge Brailsford that I represent the petitioner in this action and that he had been arrested and his room searched without a warrant in the jurisdiction of Alameda County. I informed the Judge that one of the alleged reasons for the police's failure to seek a warrant was that the arrest and search took place at approximately 1:00 P. M. and that therefore all of the judges were presumably out to lunch. I requested that Judge Brailsford inform me on the availability of judges for the purpose of issuing warrants and to appraise the validity of the police's excuse for not seeking a warrant.

11. Judge Brailsford informed me that there are approximately twenty judges capable of issuing warrants from the Oakland Court House. He stated that accounting for vacations, illnesses and other absences, approximately twelve to fourteen judges are normally available throughout an average court day. He stated that not all of these judges are absent at any one time during the day and that even those judges who are not in the Court House proper, but who are in the vicinity at a luncheon or elsewhere, are nonetheless prepared to review requests for warrants and take appropriate action. It was Judge Brailsford's opinion that failure to seek a warrant on the grounds that the judges were gone on their lunch hour could not be considered a good excuse.

12. On August 3, 1966, I talked by telephone with the Honorable Winton McKibben, Judge of the Municipal Court, Oakland-Piedmont, California, concerning the matters discussed above. Judge McKibben informed me that there are approximately nine municipal court judges, four or five of whom are available during the normal court day to review and issue warrants. He stated that there is no certainty that all judges would be gone during a normal lunch hour or that any would be in chambers during this period. He stated that in any event, there

are always one or two judges at the Court House by 1:30 P. M. on every day except Friday, at which time the judges occasionally extend their lunch hour close to 2:00 P. M. On Fridays, as on every other day, there are always four or five judges available in the Court by 2:00 P. M.

13. It was Judge McKibben's opinion that in any case, the time during which no judge in his particular court would be available to review a warrant would be "negligible", and that this would be particularly so if the petitioner ware arrested at approximately 1:00 P. M.

J. STANLEY POTTINGER

SUBSCRIBED AND SWORN TO
before me this 4th day of
August, 1966.

Notary Public
Principal Office: San Francisco

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. Civil 44385

ALFRED WALKER

vs.

LAWRENCE E. WILSON

NOTICE

TO J. Stanley Pottinger, Esq.
Attorney at Law
c/o Broad, Busterud & Khourie
Russ Building
San Francisco, California

Derald Granberg, Esq.
Deputy Attorney General
6000 State Building
San Francisco, California

YOU ARE HEREBY NOTIFIED that on August 15, 1966 JUDGE GEORGE B. HARRIS, ordered the above entitled case set for pre-trial conference September 1, 1966, 10:00 a.m.

JAMES P. WELSH
Clerk, U. S. District Court

By, PETER C. GRACE
Deputy Clerk

Received, Aug. 16, 1966

San Francisco, California
August 16, 1966

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

—*vs*—

LAWRENCE E. WILSON, RESPONDENT

PETITIONER'S FIRST INTERROGATORIES—
Filed October 21, 1966

Petitioner requests that respondent answer under oath, in writing, in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, each of the interrogatories set forth herein.

INTERROGATORIES

Interrogatory No. 1:

Prior to August 9, 1963, did Sgt. T. Hilliard of the Oakland Police Department arrest or search the premises of any person(s) on the basis of information supplied to him by Frances Jenkins (alias Frances Grisby)?

Interrogatory No. 2:

If the answer to Interrogatory No. 1 is "yes", for *each occasion* on which such an arrest or search was made:

(a) Name the person arrested or whose premises were searched;
(b) Give the date of arrest or search;
(c) Name the offense for which the arrest or search was made;
(d) Answer "yes" if the arrest or search was made upon the issuance of a warrant;
(e) State the disposition of the person arrested (e.g., released before complaint issued; released without arraignment; released after preliminary hearing; pleaded "guilty"; pleaded "innocent" and was tried; conviction or no conviction resulted; etc.);

(f) Answer "yes" if the arrest or search was made upon information supplied in part by any person(s) *in addition to* Francis Jenkins. If the answer is "yes", state whether such person(s) supplying additional information was/were:

(i) informant(s) who had given information to Sgt. Hilliard prior to August 9, 1963;
(ii) informant(s) whose prior information was reliable;
(iii) informant(s) considered to be special agents of the Oakland Police Department;
(iv) Police officer(s);
(v) other (describe).

Interrogatory No. 3:

Prior to August 9, 1963, did Frances Jenkins at any time give Sgt. Hilliard information concerning an alleged violation of law by any person, which information Sgt. Hilliard

(a) Did not consider *reliable*, or

(b) Did not consider *sufficient* (whether considered reliable or not) to make an arrest or search without a warrant?

Interrogatory No. 4:

If the answer to Interrogatory No. 3 is "yes", for *each occasion* on which such information was given:

(a) State whether the arrest or search was not made for the reasons given in Interrogatory No. 3(a) or 3(b), or both;
(b) Give the approximate date on which such information was given.

DATED: October 20, 1966.

J. STANLEY POTTINGER
J. STANLEY POTTINGER
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

vs.

LAWRENCE E. WILSON, Warden, San Quentin State Prison, Tamal, California, et al., RESPONDENT

OBJECTIONS TO PETITIONER'S INTERROGATORIES—
Filed October 21, 1966

Respondent objects to the interrogatories served on respondent on the 20th day of October, 1966, upon the grounds stated:

1. That said interrogatories are not authorized in federal habeas corpus proceedings.

With reference to the applicability of the Federal Rules of Civil Procedure to habeas corpus proceedings, Rule 81(a)(2) provides:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in . . . habeas corpus . . . ."

The statutory provisions for interrogatories in habeas corpus proceedings are restricted to those set forth in 28 U.S.C. section 2246, which provides:

> "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

Certainly the above statute does not contemplate the use of civil discovery procedures in habeas corpus proceedings. The depositions referred to are those intended as testimonial evidence at a hearing upon the habeas corpus application; the interrogatories referred to are permissible only if affidavits are used for the purpose of proof and then may be directed only to an affiant. *Sullivan* v. *United States*, 198 F.Supp. 624, 626 (S.D.N.Y. 1961). In *Sullivan*, the court, in a proceeding under 28 U.S.C. section 2255 which is analogous to habeas corpus proceedings, refused to permit the use of interrogatories propounded pursuant to Rule 33, stating:

> "While cases may be found in which certain of the Rules of Civil Procedures were said to apply to this type proceeding no reported case has been brought to our attention wherein the civil discovery practice, so traditionally alien to criminal procedure, has been held generally applicable to these proceedings which have their roots in criminal cases, and which result, if petitioner succeeds, ordinarily, in a new criminal trial.
>
> "Just because some decisions referred to § 2255 as a 'civil proceeding' does not prevent further inquiry. To us the loose use of the phrase 'civil proceeding' begs the question. It is somewhat similar to Mr. Justice Frankfurter's criticism of the phrase 'assumption of risk' in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68, 63 S.Ct. 444, 452, 87 L.Ed. 610. To adapt his language to the present contexts, 'The phrase "civil proceeding" is an excellent illustration of the extent to which uncritical use of words bedevils the law.' If this really was a civil proceeding we would suppose that all of the civil rules would be applicable including the rules encompassing the government's right to take the deposition of an adverse party, and formal pretrials, and the right to a jury, *ad infinitum*.
>
> "In our opinion, interrogatories are available to a prisoner in proceedings of this nature only to the limited extent for which statutory provision is made

as indicated [28 U.S.C. § 2246] and, therefore, we find that the general objection of the government is well taken and should be sustained." (Footnotes omitted.) 198 F.Supp. at 626-627.

Our research has produced no reported cases in which interrogatories to parties have been authorized in federal habeas corpus proceedings for discovery purposes. Since the Federal Rules of Civil Procedure relating to civil discovery have no applicability to criminal matters, it would be incongruous to sanction their use prior to an evidentiary hearing in a habeas corpus proceeding which is quasi-criminal in nature. *Sullivan* v. *United States*, *supra*, 626.

Dated: October 21, 1966

THOMAS C. LYNCH
Attorney General of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

DERALD E. GRANBERG
Deputy Attorney General
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

-vs-

LAWRENCE E. WILSON, RESPONDENT

ORDER DENYING RESPONDENT'S OBJECTIONS TO PETITIONER'S FIRST INTERROGATORIES—
October 21, 1966

The respondent's objections to petitioner's first interrogatories, having come on for hearing this day, and the Court being fully advised,

IT IS ORDERED that respondent's objections are denied, and that respondent shall answer said interrogatories on or before October 26, 1966.

DATED: Oct. 21, 1966

GEORGE B. HARRIS
GEORGE B. HARRIS
Chief Judge
United States District Court

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21,365

LAWRENCE E. WILSON, Warden California State Prison, San Quentin, California, PETITIONER

vs.

THE HONORABLE GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California, RESPONDENT

Original Proceeding in the Nature of Mandamus or Prohibition

OPINION—May 10, 1967

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge:

In this original proceeding for a writ in the nature of mandamus or prohibition, questions are presented concerning the right of an applicant for a federal writ of habeas corpus to propound written interrogatories in aid of his application.

The related habeas corpus proceeding was commenced by Alfred Walker in the United States District Court for the Northern District of California. *Walker* v. *Wilson*, Docket No. 44385. He is an inmate at California State Prison, San Quentin, California, under a judgment of conviction, and sentence, for illegal possession of marihuana. The marihuana was found in his hotel room. In his habeas corpus application. Walker alleged that the marihuana was obtained as a result of an unlawful search and seizure and that his rights under the Due Process Clause of the Fourteenth Amendment were therefore violated.

In an effort to discover evidence which would be helpful to Walker in this habeas corpus proceeding, Walker's court-appointed counsel served upon counsel for the

warden a set of four written interrogatories, purportedly pursuant to Rule 33, Federal Rules of Civil Procedure. Walker's counsel directed these interrogatories to the warden. The interrogatories, intended for discovery purposes, were designed to disclose the reliability of the informant, Frances Jenkins, upon whom Sgt. T. Hilliard had relied in making the warrantless arrest of Walker, incident to which Sgt. Hilliard made the search and seizure.

In particular, the warden was called upon to state whether, prior to the time of Walker's arrest, Sgt. Hilliard had made any other arrests or searches upon the basis of information supplied by Frances Jenkins. If the answer to this question was affirmative, the warden was asked to give the particulars as to each such prior arrest or search, including the disposition of the case.[1]

Counsel for the warden objected upon the ground that discovery interrogatories are not authorized in federal habeas proceedings. The district court overruled the objection and ordered the warden to answer the interrogatories. The warden then instituted this proceeding in the nature of mandamus or prohibition to have the district court order set aside or its enforcement restrained.

Rule 33, upon which Walker relied in serving the interrogatories, authorizes the propounding of written interrogatories to a party to the action. Rule 26, Federal Rules of Civil Procedure, pertains to the taking of the testimony of any person by deposition, which deposition may be upon oral examination or written interrogatories. Information obtained under either rule may be used as evidence at a trial to the extent provided in Rule 26(d), or for discovery purposes.

The warden contends, however, that in view of Rule 81(a)(2) of the Federal Rules of Civil Procedure, quoted

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[1] The interrogatories also required the warden to indicate whether, as to any such prior arrests or searches, Sgt. Hilliard relied in part upon any information in addition to that supplied by Frances Jenkins giving particulars. The warden was also called upon to give details of any instances, if any, in which Sgt. Hilliard received information from Frances Jenkins which Sgt. Hilliard did not consider adequate or sufficiently reliable to support a warrantless arrest.

in the margin,[2] Rules 26 and 33 do not provide authority for utilization of discovery interrogatories in habeas proceedings.

Rule 81(a)(2) pertains to, and in general limits the application of, the Federal Rules of Civil Procedure with respect to certain enumerated special proceedings, including habeas corpus. Concerning the particular problem which confronts us here, we construe Rule 81(a)(2) to provide as follows: The Federal Rules of Civil Procedure relating to discovery interrogatories are applicable in habeas proceedings provided both of the following conditions are satisfied: (1) discovery interrogatories in habeas proceedings are not otherwise provided for in statutes of the United States, and (2) the discovery practice in habeas proceedings, prior to the effective date of the Federal Rules of Civil Procedure, conformed to the then discovery practice in actions at law or suits in equity.

The warden contends that neither of these conditions is present and that Rule 81(a)(2) therefore precludes the application of Rules 26 and 33 in habeas proceedings.

Concerning the second condition, the warden argues that, prior to September 16, 1938, when the Federal Rules of Civil Procedure became effective, discovery was not available in federal habeas proceedings. In response to this contention Walker is unable to point to any instance in which discovery procedure was used in habeas proceedings prior to September 16, 1938. Nor has our research disclosed any such practice.

Walker argues, however, that habeas proceedings are civil in nature and contends that since, prior to September 16, 1938, discovery practice was available in civil proceedings in general, it must be assumed that discovery was

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[2] Rule 81(a)(2) reads:

"(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, and quo warranto. The requirements of Title 28, U.S.C. § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

available in habeas proceedings. We do not believe that the second condition of Rule 81(a)(2) can be satisfied on such a theoretical basis. In our view, that condition is met only if it can be shown that, prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practice in actions at law or suits in equity. No such showing has been made.

We therefore conclude that, by reason of the failure to satisfy the second condition of Rule 81(a)(2), the discovery-interrogatory procedure of Rules 26 and 33 is not available in habeas proceedings.[3]

Although not specifically raised by respondent, the question remains whether, independent of the Rules, some statute of the United States authorizes discovery interrogatories in habeas proceedings. The only statute which seems to have any relevancy is 28 U.S.C. § 2246 (1964), quoted in the margin.[4]

The first sentence of section 2246 authorizes depositions in habeas proceedings. It is reasonable to assume that Congress meant "depositions" to include written interrogatories as well as oral examination, since that term is so used in Rule 26, which had been in effect for ten years when section 2246 was enacted on June 25, 1948. However, this sentence of section 2246 clearly indicates that the depositions therein authorized may be used only for the purpose of obtaining "evidence," and not for general discovery purposes.[5]

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[3] In view of this holding it is unnecessary for us to decide whether the first condition of Rule 81(a)(2), noted previously in the text of this opinion, is satisfied with respect to discovery interrogatories in habeas proceedings.

[4] Section 2246 reads:

§ 2246. Evidence; depositions; affidavits

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

[5] Under this analysis, section 2246 is available to Walker for the purpose of obtaining evidence by the use of depositions obtained

The second sentence of section 2246 does not purport to authorize discovery interrogatories in habeas proceedings. That sentence pertains only to interrogatories designed to produce evidence admissible at the habeas hearing, and then only in response to affidavits which are admitted in evidence.

We therefore conclude that neither 28 U.S.C. § 2246, nor the Federal Rules of Civil Procedure, considered separately or together, authorize the propounding of discovery interrogatories in habeas proceedings.

The order authorizing the interrogatories directed to the warden is vacated.

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on oral testimony or written interrogatories. But on the specific question Walker seeks to raise in his habeas proceeding—the reliability of the informant relied upon by the arresting officer—the *warden* could not give admissible evidence because any knowledge he would have on this matter would be hearsay. It should also be noted that the authority provided by section 2246 for the taking of depositions in habeas proceedings for evidentiary purposes, is as available to the warden as to the appellant for a writ.

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